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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/620,038

07/15/2003

Justin Shimek

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EXAMINER

MAHAFKEY, KELLY J

ART UNIT

PAPER NUMBER

1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
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3 MONTHS

02/22/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No. 10/620,038	Applicant(s) SHIMEK ET AL.	
	Examiner Kelly Mahafkey	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 January 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-39 and 81 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration:
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-39 and 81 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>1/23/07</u> | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Amendments made January 23, 2007 have been entered.

Claims 1-39 and 81 are pending.

Note: As stated in the advisory action mailed December 8, 2006, the 112 rejections of claims 79-81 has been withdrawn.

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 1/23/07 has been entered.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-36, 38, and 79-81 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zietlow et al. (US 6207216 B1) in view of Igoe (Dictionary of Food Ingredients, 4th Edition). The references and rejection are incorporated herein as cited in the office action mailed March 7, 2006.

The new limitations added by the amendments made January 23, 2007 are incorporated in claims 1, 2, and 5. These limitations are related to the amount of softening agent in the aerated product and the glass transition temperature and spring back of the final product. The limitations concerning the glass transition temperature and spring back factor of the final product are similar to the previously rejected claims 5, 7, and 32 and thus they are rejected for the same reasons. Specifically regarding these claims, applicant is reminded that they have described the product with parameters which cannot be measured by the office for prior art comparison, because the office is

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not equipped to manufacture prior art products and compare them for patentability purposes. Since the references teach of a composition similar to that of applicants' invention, a prima facie case of obviousness has been properly established; the burden is shifted to the applicant to show that the prior art product is different. Regarding the newly added limitation of 5-25% softening agent in the aerated product, applicant is referred to Zietlow, Column 1 lines 21-35, in which Zietlow teaches moisture loss a problem in marshmallow compositions, Zietlow, Column 4 lines 46-51, in which Zietlow teaches that 0.01-25% additional ingredients may be added to the marshmallow composition in order to enhance organoleptic properties, and Igoe, pages 66-67, which teach glycerin, as a known ingredient in marshmallow composition that prevents moisture loss in food products. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include 0.01-25% glycerin in the aerated product as taught by Zietlow to improve the moisture retention ability of the product, thus improving the organoleptic properties of the product

Claims 37 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zietlow in view of Igoe, further in view of Gajewski (US 4,251,561). The references and rejection are incorporated herein as cited in the office action mailed March 7, 2006.

Response to Arguments

Applicant's arguments filed January 23, 2007 have been fully considered but they are not persuasive.

Applicant argues that there is no motivation for the addition of glycerin (i.e. a softening agent) to the marshmallow composition as taught by Zietlow. Applicant is referred to the previous office action in which this argument was addressed, as well as the following:

· Zietlow, Column 1 lines 21-35, in which Zietlow teaches moisture loss^{is} a problem in marshmallow compositions.

· Zietlow, Column 4 lines 46-51, in which Zietlow teaches that 0.01-25% additional ingredients may be added to the marshmallow

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composition in order to enhance organoleptic properties.

Igoe, pages 66-67, which teach glycerin, as a known ingredient in marshmallow composition that prevents moisture loss in food products.

Applicant's argument that there is no motivation to add glycerin (a softening agent) to the marshmallow as taught by Zietlow is not convincing, as one would have been motivated to add glycerin to the marshmallow as disclosed by Zietlow in order to prevent dehydration of the marshmallow.

Applicant argues that Zietlow specifically teaches away from the use of a softening agent, and that the use of a softening agent will destroy the marshmallow product as taught by Zietlow. Applicant is referred to the following:

- Zietlow, Column 3 lines 51-55, in which Zietlow teaches of the marshmallow product as including a corn syrup.

- Zietlow, Column 4 lines 12-18, in which Zietlow teaches of the marshmallow composition as including sodium caseinate.

- Both corn syrup and sodium caseinate are known humectants and thus they are also softeners.

- As acknowledged by applicant, specification paragraph 0010, humectants function as "softeners" in marshmallow compositions, such as the one taught by Zietlow.

Applicant's argument, that the addition of a softener to the marshmallow product as taught by Zietlow would destroy the marshmallow is not convincing as the product as disclosed by Zietlow includes softeners.

Conclusion

This is a continuation of applicant's earlier Application No. 10620038. All claims are drawn to the same invention claimed in the earlier application and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application. Accordingly, **THIS ACTION IS MADE FINAL**

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even though it is a first action in this case. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no, however, event will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Kelly Mahafkey
Examiner
Art Unit 1761



KEITH HENDRICKS
PRIMARY EXAMINER